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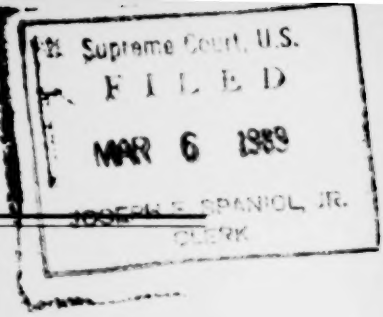

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HELEN PAGE NORTON, individually and as trustee for the use and benefit of Dale Page Norton and John Jay Norton, and DALE PAGE NORTON and JOHN JAY NORTON, on their own behalf,

Petitioners,

v.

RUSTE DURNELL BRIDGES, Deceased, for whose estate no administrator has been appointed, formerly a disabled person under the law of Illinois and Successor Trustee of the John L. Page Trust, who, pending the appointment of an administrator, is being treated as in being for all purposes that are necessary for the protection of others, and PATRICK T. MURPHY, individually and as Public Guardian of the County of Cook, State of Illinois, as Guardian of her Estate,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE WISCONSIN COURT OF APPEALS, DISTRICT IV

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QUESTIONS PRESENTED

I

Whether under the decision of the United States Court of Appeals in this case in Norton v Bridges, 719 F.2d 1156, 1166 (7th Cir 1983), ordering the Circuit Court of Jefferson County, Wisconsin, to appoint a successor trustee, as its first assumption of jurisdiction over the trust and its assets, which it failed to do, and which would have entitled it to adjudicate the entire controversy, and under the unpublished order of the Wisconsin Court of Appeals in this case affirming an order of said circuit court dismissing this suit for a purported want of prosecution, the State of Wisconsin has deprived petitioners of their procedural rights and property without due process of law, and has denied them the protection and equal protection of the laws, in violation of their federal rights under the 14th Amendment § 1.

II

Whether under the decision of this Court
n Link v. Wabash Railroad Co., 370 US 626,
29-630, 632-3, (1962), and the decision of the
upreme Court of Wisconsin in Neylan v. Vor-
ald, 124 Wis 2d 85, 90, 368 NW2d 648, 651-52
1985), and the decision of the Wisconsin Court
f Appeals in Rupert v. Home Mutual Ins. Co.,
38 Wis 2d 1, 405 NW2d 661 (Wis App 1987), the
ecision of the Wisconsin Court of Appeals in
his case in the unpublished opinion below,
he latter decision is a void judgment for want
f any standard to justify a dismissal for want
f prosecution, and a deprivation of petition-
rs procedural rights and property without due
rocess of law, and a denial to them of the
rotection and equal protection of the laws, in
iolation of the 14th Amendment § 1, to the
onstitution of the United States.

III

Whether the trial judge, who entered the judgment dismissing the suit for a purported want of prosecution, had any discretion to do so, when under the Wisconsin statutes the case was deemed ready for trial because more than one year had passed after the summons and complaint were filed, and he was under a duty to call the case for a pretrial conference and set the case for trial because more than 60 days had passed since the one year had expired, without depriving petitioners of their procedural rights and property without due process of law, and denying them the protection and equal protection of the laws, in violation of their federal rights under the 14th Amendment § 1, under the rule that a judge who is himself responsible for the delay or otherwise remiss in the performance of his own duty, cannot dismiss a suit for want of prosecution.

IV

Whether the circuit court is under a duty to appoint a successor trustee of the John L. Page Trust and an administrator for the estate of the deceased successor trustee under the trust agreement and the decision of the United States Court of Appeals in this case and the Wisconsin statutes and its in rem and quasi in rem jurisdiction over the assets of the trust estate and its jurisdiction over the person and the estate of the deceased and the person and estate of the public guardian to enforce their duty to account and to enforce their personal liability for their failure to do so.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HELEN PAGE NORTON, individually and as trustee for the use and benefit of Dale Page Norton and John Jay Norton, and DALE PAGE NORTON and JOHN JAY NORTON, on their own behalf,

Petitioners,

v.

RUSTE DURNELL BRIDGES, Deceased, for whose estate no administrator has been appointed, formerly a disabled person under the law of Illinois and Successor Trustee of the John L. Page Trust, who, pending the appointment of an administrator, is being treated as in being for all purposes that are necessary for the protection of others, and PATRICK T. MURPHY, individually and as Public Guardian of the County of Cook, State of Illinois, as Guardian of her Estate,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE WISCONSIN COURT OF APPEALS, DISTRICT IV

PETITION FOR A WRIT OF CERTIORARI

Helen Page Norton and Dale Page Norton and John Jay Norton, by their attorney Hugh M. Matchett, petition for a writ of certiorari to the Wisconsin Court of Appeals, Fourth District, to review a decision dated and released and filed on August 4th, 1988, which became final on December 6th, 1988, on denial of a petition for review by the Supreme Court of Wisconsin, affirming an order of dismissal for a purported want of prosecution dated December 16th, 1985, and from The Findings of Fact, Conclusions of Law, and Order of Dismissal dated June 20th, 1986, of the Circuit Court of Jefferson County, Wisconsin, finding that petitioners had failed in their burden of proof that the case had been diligently prosecuted, and also dismissing the suit for their purported failure to comply with the statutes governing procedure in civil matters, and declar-

ing that the dismissal operates as a adjudication on the merits and with prejudice.

The suit itself is a petition to appoint a Successor Trustee of the John L. Page Trust in lieu of Ruste Durnell Bridges, a disabled person under the law of Illinois, now deceased, with directions to reduce the assets of the trust now in the possession of Patrick T. Murphy, as Public Guardian of the County of Cook, State of Illinois, to the trustee's possession, and to administer and terminate the trust under the direction and control of the Circuit Court of Jefferson County, Wisconsin, and to require the Public Guardian to account, and to make restitution, with interest, and to pay reasonable attorney's fees.

OPINIONS BELOW

The opinions are not published. The opinion of the Wisconsin Court of Appeals is prin-

ted in the Appendix, commencing at Page A-1. The circuit court judgments of December 16th, 1985, and June 20th, 1986, are printed in the Appendix, respectively, commencing at pages 11 and 20.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U<S< Code § 1257(3).

STATEMENT OF THE CASE

At all times during the period December 28th, 1983, to and including December 16th, 1985, the date the suit was dismissed for a purported want of prosecution, to and including June 20th, 1986, when the dismissal became final, the circuit court was under a duty to appoint a successor trustee to represent the trust or to protect the assets of the trust itself, and violated its fiduciary duty in failing to do so.

At all times after November 28th, 1984, and the suit had been on file in the circuit court for over a year, disregarding the time the case had been in the Federal courts, it was deemed ready for trial by statute, and the trial judge was under a duty to call a pre-trial conference, and set the case for trial, and to try it on the merits, which it failed to do.

We start with the closing lines of the decision of the United States Court of Appeals in this case in Norton v Bridges, 712 F.2d 1156, 1166, (Appendix A-27, at page A-45-6), where the court said:

> "In the present case, the Jefferson County, Wisconsin court is not only accorded a power of appointment but will forthwith be required to exercise it. . . . The exercise of the power to appoint a successor trustee of the Page trust will constitute the first assumption of jurisdiction in this case and will entitle the Wisconsin state court to adjudicate the entire controversy, thereby exclud-

ing the federal district court from any role in the controversy.

"CONCLUSION

"The Jefferson County, Wisconsin court may assert exclusive jurisdiction over the entire claim urged by Norton. The varying relief Norton seeks suggests that the court having power over the trust, to which the assets are subject, is the appropriate forum in which to litigate this dispute. Such an assertion of jurisdiction is consistent with the requirements of both due process and Wisconsin statutory law. Further, the consolidation of all proceedings regarding the trust in one court is consistent with the policy favoring resolution of all trust-related questions in one forum. The order of the district court dismissing Norton's claim seeking a reduction of trust assets, an accounting, and termination of the trust is reversed. The case is remanded to the district court with instructions to remand the entire matter to the circuit court of Jefferson County, Wisconsin."

We shift our statement of the case to the decision of the Wisconsin Court of Appeals sought to be reviewed (Appendix A-1).

The Court of Appeals (A-2) states:

> "The dispositive issue is whether the trial court abused its discretion by dismissing the action. Because it did not, we affirm."

In its conclusion (A-8) it states:

> "Norton also claims that the mandate from Norton v. Bridges, 712 F.2d 1156 (7th Cir 1983), required the Jefferson county circuit court to appoint a successor trustee. Whatever legal effect such mandate may have had we conclude that it could not protect Norton from a dismissal for her lack of prosecution. The fact that Norton did nothing to prosecute her case from April 2nd, 1984 to December 16, 1985 provides a basis for the court's discretionary decision. Therefore we sustain it. (3.. We do not determine whether the circuit court has a continuing duty under sec. 701.17(1), Stats., to appoint a successor trustee.)"

In its opinion (A-6) it states:

> "Norton alleges that it was the trial court's duty to set the case for trial. However, in Wisconsin, '/t/he obligation to bring his case to trial within a resonable time lies with the plaintiff.'"

In a footnote (A-7) it states:

> "'In probably the most significant changes from current practice, the new rules —most especially section 802.10.— place the responsibility for moving the case on the court, as well as on the attorneys.' Clausen and Lowe, The New Wisconsin Rules of Civil Procedure: Chapters 801-803, 59 Marq. L. R. 1, 68 (1976). The plaintiff now shares the burden of bringing a case to trial."

It also states:

> "Norton relies on Neylan v.Vorwald, 124 Wis.2d 85, 368 N.W.2d 648 (1985), for the proposition that a trial court may not dimiss a case for lack of prosecution without first giving notice. However, Norton was given twenty days' notice to show good cause for not dismissing her case before the order became final."

It ignored petitioners' argument in their brief, page 38, that: "When a court assumes the duty of setting a date for trial the suit cannot be dismissed for want of prosecution. . . . Mikos v. Sarasota Cattle Co., 1984, Fla. 453 So 2d 402, 403" and also at page 46.

It has also ignored petitioners' first amendment to their petition filed on April 2nd, 1984, where the first part of the title of the case was changed to read: "Helen Page Norton, individually and as trustee for the use and benefit of Dale Page Norton and John Jay Norton, and Dale Page Norton and John Jay Norton, on their own behalf, Petitioners.", by disregarding her status as trustee, and her children's right, as adult beneficaries, to petition on their own behalf

It has also ignored the basic constitutional issues that were raised by petitioners in their motion to vacate the Order of December 16th, 1985, which said:

> "Under the circumstances as they understand the situation, the Order of December 16th, 1985, is a deprivation of procedural right and remedy without due process of Wisconsin law,

> and a denial to them of the protection and equal protection of that law, in violation of their rights under the Constitution of the State of Wisconsin and their federal rights under the 14th Amendment, Section 1, to the Constitution of The United States, and under 42 USC Section 1983."

and their argument at page 10 of their brief on appeal that the Orders of December 16th, 1985, and June 20th, 1986, are void orders, depriving petitioners of their property without due process of law, and denying them the protection and equal protection of the laws, in violation of the Constitution of the State of Wisconsin, and the 14th Amendment, Section 1, to the Constitution of the United States.

The circuit court and the Wisconsin Court of Appeals have completely ignored the decision of the United States Court of Appeals, especially the federal constitutional issues decided by it that are the law of this case unless reversed by this Court.

REASONS FOR GRANTING THE WRIT

In Link v Wabash Railroad Co., 370 U.S 626, at pages 629-633, this Court said:

> The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted. The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts. The power is of ancient origin, having its roots in judgments of non-suit and non prosequitur entered at common law, e.g., 3 Blackstone, Commentaries (1768), 295-296, and dismissals for want of prosecution of bills in equity, e.g., id., at 451. It has been expressly recognized in Federal Rule of Civil Procedure 41(b) . . . . The authority of a court to dismiss sua sponte for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases. . . .
>
> Nor does the absence of notice as to the possibility of dismissal or the failure to hold an adversary hearing necessarily render such a

dismissal void. It is true, of course, that "the fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked." Anderson v. Luckett, 321 U.S. 233, 246. But this does not mean that every order entered without notice and a preliminary adversary hearing offends due process. The adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such a party may be taken to have of the consequences of his own conduct. The circumstances here were such as to dispense with the necessity for advance notice and hearing.

. . . . Petitioner never sought to avail himself of the escape hatch provided by Rule 60(b).

Accordingly, when circumstances make such action appropriate, a District Court may dismiss a complaint for failure to prosecute even without affording notice of its intention to do so or providing an adversary hearing before acting. Whether such an order can stand on appeal depends not on power but on whether it was within the permissible range of the court's discretion.

We are here to take the measure of that rule.

For our purpose holds, and there is a felt need, that this Court grant certiorari, and use this case to build a federal standard on your decision in the Link case, as a matter of due process of law, and of the protection and equal protection of the laws, under the 14th Amendment, Section 1, to the Constitution of the United States, by recognizing an inherent limitation on the inherent power of a court to dismiss a suit for want of prosecution, by holding that a court has no discretion to dismiss a suit for want of prosecution when the court itself is remiss in its duty to appoint a trustee, or to obey the mandate of a superior court, or to set the case for a pretrial conference, or to call the case for a pretrial conference, or to set the case for trial, or to call the case for trial, or to try the case on the merits, or to give advance

warning that the suit will be dismissed for want of prosecution unless that situation is immediately corrected or by a given date, or without exhausting all reasonable alternatives to dismissing the suit for a purported want of prosecution.

For it is absolutely necessary that in exercising the awful power of dismissing a suit for want of prosecution, and deciding the case in favor of the adverse party without regard to the merits of the case, a court must be acting with the cold neutrality of a stern impartial judge, and not from personal prejudice against the petitioner or in favor of his opponent, or simply an urge to get rid of the litigation without passing on the merits of case because of some conflict of interest that is not immediately apparent, such as his inability to understand the case or to cover his own dereliction of duty.

This brings us to the consideration of the Wisconsin statute and the decisions of the Supreme Court of Wisconsin and the Wisconsin Court of Appeals on the subject.

Sec. 805.03, Wis. Stats., provides in material part:

> "For failure of any claimant to prosecute or for failure of any party to comply with the statutes governing procedure in civil actions or to obey any order of court, the court in which the action is pending may make such orders in regard to the failure as are just, including but not limited to orders authorized under s. 804(2)(a). Any dismissal under this section operates as an adjudication on the merits unless the court in its order for dismissal otherwise specifies for good cause shown recited in the order. . . . ."

In Neylan v Vorwald, 124 Wis 2d 85, 94, (Sup. Ct. 1985), 368 NW2d 648, the Court said:

> "The present rule governing this case is sec. 805.03, Stats., which was adopted by supreme court order, 67 Wis. 2d 690, as part of the Wisconsin Rules of Civil Procedure. The Wisconsin rules were prepared by the

judicial council and were patterned after the Federal Rules of Civil Procedure."

At page 92, it states:

"The present rule, sec. 805.03, does not state any time limit within which trial must proceed after commencement of the action and therefore does not import any constructive knowledge to litigants or their counsel of the outside time limits a court will consider as being a 'failure to prosecute,' nor does it provide that actual notice be given. Where no constructive notice is given, fundamental fairness and due process require a litigant be given actual notice before a court enters a dismissal without notice and motion of any party. Otherwise, what a judge feels to be a failure to prosecute a case will depend on the individual judge's thinking, the court's calendar, and the rate of case intake and disposition. Section 805.03 alone imports no knowledge in advance to litigants of what is expected in prosecuting a case in a particular trial court to avoid dismissal consequences under the provisions of sec. 804.12(2)(a) and particularly sec. 804.12(2)(a) 3."

At page 94, the court said:

"Section 805.03, Stats., with reference to sec. 804.12(2)(a), forewarns of a dismissal penalty for failure to

> to prosecute an action, there is no constructive notice of what must be obeyed to avoid a dismissal."

At page 95 it states:

> "We find the dismissals ordered by the trial court without actual notice before entry precluded the opportunity to be heard. Therefore, they were lacking in that fundamental requisite of due process. The court of appeals has held that: 'Judgments entered contrary to due process are void.' . . . We accept that holding and find that where no advance actual notice of dismissal which contains a clear standard or definition of what constituted 'the failure to prosecute,' due process is lacking and the dismissal judgments are thereby void."

The instant case is governed by the Neylan case because the Nortons had no basis, either in statutory or case law, to anticipate the trial court's definition of "failure to prosecute.".

In Rupert v Home Mut. Ins. Co., 138 Wis 2d 1, 405 NW2d 661 (Wis.App. 1987), the Court of Appeals reversed and remanded an order dis-

missing a suit for want of prosecution. At Id. 9-10, 405 NW2d at 664, it said:

> "While sec. 805.03 fails to define the outside limits of 'failure to prosecute,' the statute governing calendar practice provides a basis for the trial court to create these limits. Section 802.10(2), Stats., provides:
>
> Unless excepted under sub. (1), all actions and special proceedings are deemed ready for trial one year after the summons and complaint are filed. Within 60 days after the expiration of one year, the court shall by order set dates for a pretrial conference and for trial. [Emphasis added.]
>
> "By setting pretrial conferences and trial dates, the court defines diligent prosecution of an action. After one year has passed, a plaintiff may reasonably assume that the court will set those dates within sixty days. It is unreasonable that a plaintiff, anticipating receiving pretrial conference and trial dates, should instead receive a notice of intent to dismiss. Here, rather than setting the required dates, and thus providing the plaintiff with an outside limit of conduct expected for diligently pursuing its action, the trial court moved to dismiss the one-year-old suit.

* * *

". . . Section 802.10(2) is silent as to the effect of 'deeming' an action ready for trial. We read sub. (2) merely to place a duty on the trial court to set dates, within a specified period, for the pretrial conference and trial. 'Deeming' an action ready for trial simply gives voice to a legislative presumption that after one year an action should have progressed to the point where the court can intelligently exercise its duty to set the required dates. Here, the record shows no attempt to set the required dates, nor does the record show that Rupert would have been unprepared for a pretrial conference or trial. We cannot agree that a statute governing trial court calendar practice imputes to the trial court the power to impose the severe penalty of dismissal only one year after an action's commencement.

"Moreover, sec. 802.10(2) is silent as to any consequences if an action is not ready for trial within one year. In contrast, sec. 802.10(3)(d), governing scheduling conferences, specifically makes violation of scheduling orders subject to penalties under sec. 805.03, Stats. We find significant the absence of a s-milar provision in sub. (2).

"We must view a statutory action in its entirety. [Citation omitted.] Where a comprehensive statute specificically grants a power in one section and is silent with respect to

that power in another, we must assume a legislative intent to exclude the exercise of power under the latter section. [Citation omitted.] The legislature's silence in sub. (2) reveals an intent to exclude sec. 805.03 penalties from sec. 802.10(2). Section 802.10(2), 'deeming' an action ready for trial one year from filing, does not satisfy the fair and adequate warning required by due process.

"We are not suggesting that a litigant may sit idly by for the first year of a lawsuit awaiting pretrial conferences and trial dates. Rather, we hold that before imposing a sanction as drastic as dismissal, advanced notice is required. The federal rule empowering trial courts to dismiss for failure to prosecute has been construed to require the court to explore less drastic alternatives prior to dismissal. See 24 Am. Jur.2d Dismissal sec. 49 (1983). Several alteratives are available to the trial court to accomplish the goal of diligent prosecution of claims. For example, sec. 802.10(3) permits the court to call a scheduling conference within ninety days of an action's commencement. Further, even absent a preliminary conference, courts are able to advise each litigant at the time a lawsuit is filed of any local rules and penalties."

The key line in the Rupert case is the

line reading: "By setting pretrial conferences and trial dates, the court defines diligent prosecution of an action." The trial judge in the instant case never defined it, unless it can be said that he defined it by his conduct in doing nothing between April 2nd, 1984, and December 16th, 1985, when he dismissed the suit for want of prosecution, when it was his duty to appoint a successor trustee, and call a pretrial conference, and set the case for trial. Under the judge's own standard there was no want of diligent prosecution of the action, only lack of a diligent performance of duty by the judge.

The decision of the Wisconsin Court of Appeals in the Rupert case, and the decision of the Supreme Court of Wisconsin in the Neylan case, are based upon the decision of this Court in the Link case, and assuming that each decision is correctly decided, the judgment of

the Wisconsin Court of Appeals and the judgments of the circuit court appealed to it in this case are void judgments beyond the permissible range of the court's discretion because the Wisconsin statutes and cases do not contain a clear standard of what constitutes failure to prosecute, and no advance actual notice of dismssal which contained a clear standard of what constitutes failure to prosecute was given, and the trial judge failed to define diligent prosecution because he failed to appoint a successor trustee, and to set the case for a pretrial conference after the case had been on file for over a year and was deemed ready for trial, and to set it for trial, with the result that due process is lacking.

So also is the protection and equal protection of the law.

The late George Gleason Bogert, in his Handbook of the Law of Trusts, Third Edition, Hornbook Series, West Publishing Co., 1952, Page 110, stated our position precisely, when he wrote:

> "Equity has as a part of its inherent jurisdiction the power and the duty to see that trusts are protected and carried out, and the filling of the office of trustee is a part of this function."

This position is confirmed by Sir Edward Coke, in his First Part of the Institutes of the Laws of England, Eighteenth Edition, Corrected, 1823, by Charles Butler, Special Edition, Copyright 1985, The Legal Classics Library, Volume II, 290.b VI, where it states:

> "In a court of equity it is sufficient that the trust appears and if the party creating the trust has not appointed his own trustee, the court of equity will follow the legal estate, and decree the person in whom it is vested to execute the

trust. See ant. 113, note 2, it being a rule which admits of no exception that a court of equity never wants a trustee."

In Batesville Institute v Kauffman. 85 US 151, 154 (1871), this Court said:

"That this court has power to appoint a new trustee, and to compel the performance of the trust by him, is quite certain. It is, however, equally within the power of a court of equity to decree and enforce the execution of the trust through its own officers and agents, without the intervention of a new trustee. (Story, Equity Jurisprudence, §§ 976, 1060, 1061.)"

In McWilliams v Gough, 116 Wis 576, 583, (1906), the court said:

"A trust never fails for want of a trustee. While the office becomes vacant the trust continues, its execution only being interrupted. Judicial power, under the equity jurisdiction, will fill the office in form or effect, and compel and supervise the execution of the trust where there is no statute to provide for the emergency."

In Will of Hill, 261 Wis 290, 298 (1951), the Supreme Court of Wisconsin said:

> "If the Foundation is in fact unqualified to be a trustee and declines to qualify, it is a general rule that a trust never fails for want of a trustee and the court, in its equity powers, may appoint one or may execute the trust by its own officers."

§ 701.17(2) Wisc. Stats., provides:

> "If it appears necessary, the court may appoint a special trustee until a successor trustee can be appointed or, where a trust has terminated, to distribute the assets. A special trustee may be appointed without notice and may be removed whenever the court so orders. Such special trustee shall give such bond as the court requires and shall have the powers conferred by the order of appointment and set forth in any letters of trust issued him."

It necessarily follows that at all times during the period December 28th, 1983, to and including December 16th, 1985, the trial judge had the inherent power and the duty to appoint a successor trustee and failed to do so.

In Maxwell v U of M, 159 Mich App 417, (1987), 407 NW2d 16, MCR 2.502, provided for dismissal for lack of progress, but also provided that an action could not be dismissed if it was set for trial, or scheduled for a pretrial conference, or before a date specified for completion of discovery. MCR 2.501(A)(1), concerning scheduling trials, provided:

> "Following the time of completion of discovery as determined under MCR 2.301, the court shall schedule a pretrial conference under rule 2.401, schedule the action for mediation under MCR 2.403, or schedule the action for trial. [Emphasis added.]"

Martin, Dean & Webster, Michigan Court Rules Practice, Rule 2.502, Author's Comment, p 11, states in relevant part:

> "At the conclusion of the time set for discovery, the court must set the action for pretrial or trial. Thus all actions in which an answer has been filed are precluded from the operation of MCR 2.502 until trial or other disposition of the action is completed."

In their footnote, the commentators said:

> "In circuits which have approved local court rules requiring that one of the parties file a demand for trial, etc. before trial or pretrial is scheduled, those cases in which no such demand is filed within one year from the close of discovery are also subject to dismissal under the provisions of Rule 2.502. The authors would note, however, that the individual circuit must have passed a local court rule altering the provisions of MCR 2.502. If it has not, but simply possesses an informal procedure calling for such filings, the authors question how the court may dismiss an action when the basis of dismissal is the court's own non-compliance with MCR 2.501, i.e., if the court had complied with MCR 2.501 and independently set the case for trial, the case would not be subject to dismissal under MCR 2.502."

In that case the plaintiff appealed from an order dismissing with prejudice for no progress his wrongful discharge suit pursuant to MCR 2.502, in spite of the fact the court had not complied with MCR 2.501. The Court of Appeals at Page 422 (407 NW2d 19) said:

> "W/hile the Ingham Circuit Court (Thirtieth Judicial Circuit) Local Rules may have formerly required a party to file a demand for a pre-trial and trial before a case will be put on the docket calendar, the current Local Court Rules which became effective on March 1, 1985, with the new Michigan Court Rules contain no such provision. See Michigan Rules of Court 1986 (West Publishing Co.), pp. 755-760. Thus, as the commentators suggest, absent such a local court rule, the trial court may not dismiss this case because the basis for dismissal is the court's own noncompliance with the MCR 2.501 provision that the court itself must set the case for trial."

The case is similar to the case at bar because there is no statutory requirement in Wisconsin that a case be noticed for trial, and after a case has been on file for more than a year, it is the duty of the court itself, within 60 days thereafter, to call a pretrial conference and set the case for trial.

In Crown Inter. v City of Elkhart, Ind App, 430 NW2d 921 (1982), the court held that a remonstrance in annexation proceedings was in the nature of a defense, and such action was not properly subject to dismissal for lack of prosecution, but the statute involved provided that:

> "W/hen the remonstrance is determined to be sufficient the court sua sponte shall set a hearing date which should be not more than sixty (60) days thereafter." (922.),

and said:

> "In addition the result [of dismissal] cannot be rationalized as a matter of necessary docket control by the trial judge. The annexation statute imposed upon the court the obligation and the duty to order the case for trial. It could have done so rather than issue the rule to show cause."

The statement is only common sense. When a court is under a duty to call a case for trial it cannot dismiss the suit for want of prosecution. This is the crux of our position.

In Mikos v Sarasota Cattle Co., 453 So2d 402 (Fla 1984), the Supreme Court of Florida held that once the plaintiff has given notice that it is ready for trial, the trial judge must enter an order fixing a date for trial, and, if he does not do so, is precluded from dismissing the action for want of prosecution. Both parties had noticed the case for trial but the court had not set the case for trial. The court said:

> "Neither party took any further action, nor did the court, until over a year later on August 11, 1982, when Mikos filed a motion to dismiss for lack of prosecution pursuant to Florida Rule of Civil Procedure 1.440(b). The district court reasoned that since it is the trial court's responsibility to enter an order fixing a date for trial under Rule 1.440(c) once notice of trial is given, the filing of the notice bars the trial court from dismissing the action for lack of prosecution . . .
>
> "We agree with the decision below in all respects. A trial judge has sole discretion in determining the order in which the cases will be tried at particular times. The rules

> contemplate that whenever a plaintiff is ready for trial his attorney must notify the court and ask the court to enter an order setting a trial date. It is inappropriate for a trial attorney to pressure a judge into setting a date. We would like to add, however, that if a plaintiff subsequently indicates that he is not ready for trial, then the filing of the notice of trial will not be a bar to a dismissal for lack of prosecution."

The case is directly applicable to this litigation. The judge was under a duty to call the case for a pretrial conference and set the case for trial, and dismissed the suit for want of prosecution, and under the Florida case he could not have done so.

In Nyberg v Cambridge State Bank, 245 Minn 312, 73 NW2d 345, 347-8 (1955), with one dissent, the Supreme Court of Minnesota held that once a case is noticed for trial it could not be dismissed with prejudice for want of prosecution on the preliminary call of the calendar because "the case could not be so dismissed

until it is actually called for trial." In Braze v Schmitz, 305 Minn 537, 538, 233 NW2d 559 (1975), the court refused to adopt any exception to that rule. But where the plaintiff has not noticed his case for trial it could be dismissed for want of prosecution. Copeland v Bragg, (Minn App), 378 NW2d 35, 39 (1985). We agree with these decisions. A case should not be dismissed for want of prosecution until it is actually called for trial.

These cases all support our proposition that a court should not be permitted to dismiss with prejudice a suit for a purported want of prosecution at the very time the judge is under a duty to call the case for a pretrial conference and set the case for trial. We have already established that equity has as a part of its inherent jurisdiction the power and the duty to see that trusts are protected

and carried out, and that the filing of the office of trustee is part of that function, but it is equally within the power of a court of equity to decree and enforce the execution of a trust through its own officers and agents.

It is evident that the circuit court judge in dismissing this suit with prejudice for a purported want of prosecution during the same period he had failed to perform his duty to appoint a successor trustee or to enforce the trust through his own officers and agents, and during the last part of which period he had failed in his duty to call the case for a pre-trial conference and set it for trial and try it, without offering any justification or excuse for his own inactivity, violated his own duty in doing so, with the result the judgment of dismissal is a void judgment. It certainly is hypocritical.

The following quotations from ecclesiastical sources support our position:

> "Judge not, that ye be not judged. For with what judgment ye judge, ye shall be judged: and with what measure ye mete, it shall be measured to you again. And why beholdest thou the mote that is in thy brother's eye, but considerest not the beam that is in thine own eye? Or how wilt thou say to thy brother, Let me pull out the mote of thine eye; and, behold, a beam in thine own eye? Thou hypocrite, first cast out the beam of thine own eye; and then shalt thou see clearly to cast the mote out of they brother's eye." Holy Bible, Matthew 7:1-5.

> "Those who stand guilty of grievous sins should not judge those who are guilty of the same or lesser sins . . . A/ man condemns himself so as to deserve to be condemned once again, . . . when, in condemning another, he shows himself to be equally deserving of condemnation on account of another or a like sin." St. Thomas Aquinas, Treatise On Justice From Summa Theologica, Second Part of Second Part, Questions 57-122, Q. 60, Art. 2, Page 1447-8.

> "Yea, woe to him who, as the great Pilot Paul has it, while preaching to others is himself a castaway!" Herman Melville, Moby Dick, The Modern Library Giant Edition 1944, Page 68.

Judge Benjamin N. Cardozo, in his Nature of the Judicial Process, 109-110 (1922) said:

> "Some relations in life impose a duty to act in accordance with the customary morality and nothing more. . . . Other relations in life, as, e.g., those of trustee and beneficiary, or principal and surety, impose a duty to act in accordance with the highest standards which a man of the most delicate conscience and the nicest sense of honor might impose upon himself. In such cases, to enforce adherence to those standards becomes the duty of the judge."

The higher standard is undoubtedly the standard applicable to a judge in relation to the lawyers and clients appearing before him in the discharge of his judicial duties, and the standard that was applicable in relation to them in dismissing this suit for a purported want of prosecution, and to the Wisconsin Court of Appeals in reviewing this case. It is obvious that the circuit court judge failed to measure up to that standard when he failed to

appoint a successor trustee or to enforce the trust by his own officers and agents, and that he failed to measure up to that standard when he failed to call the case for a pretrial conference and set it for trial and try it.

It may reasonably be inferred from that conduct that the judge had a personal bias or prejudice either against petitioners and their attorney or in favor of the respondents.

It may be reasonably inferred from those facts and inferences of fact that the circuit court judge failed to measure up to the duty imposed upon him to act in accordance with the highest standards which a man of the most delicate conscience and the nicest sense of honor might impose upon himself when he dismissed the suit for a purported want of prosecution when he had not performed his own duty in the premises.

It may be reasonably inferred under the circumstances that the circuit court judge dismissed this suit for a purported want prosecution because he was seeking to justify himself from any responsibility for the delay, in violation of the fundamental principle:

> "No one ought to be a judge in his own cause; . . . This maxim applies to all cases where judicial functions are to be exercised, and excludes all who are interested, however remotely, from taking part in their exercises. It is not left to the discretion of a judge, or to his sense of decency, to decide whether he shall act or not; all his powers are subject to this absolute limitation; and when his own rights are in question, he has no authority to determine the cause."

Thomas M. Cooley, Treatise On Constitutional Limitations Which Rest Upon The Legislative Power Of The States Of The American Union, Boston: Little, Brown, And Company, 1868, Special Edition Copyright 1987, The Legal Classics Library, Pages 410-411. This rule should not be limited to financial interests.

It is evident that the trial judge did not understand the nature of the litigation, nor the fact that he had jurisdiction over the trust funds in Illinois, or the fact that in dismissing the suit for a purported want of litigation with prejudice, if the judgment is a valid judgment, he had foreclosed any later litigation in Illinois, when he said:

> "It would seem to me that despite the lack of prosecution, we have other reasons to continue this matter in Illinois, the res is in Illinois, the subject of the controversy; Ruste Bridges, the defendant, was a resident of Illinois and her estate, if any, should have to be probated there, and it would seem to me that this is a matter for the probate court in Cook County, Illinois, whatever the efficacy and correctness of this Court's decision to dismiss the case on notice, and I'm going to deny your motion [to vacate the judgment of dismissal for want of prosecution].
>
> "All right, Mr. Matchett has asked about the decision of the United States District Court [rather the decision of the United States Court of Appeals For The Seventh Circuit] with the death of Ruste Bridges, any reason

> whatever for continuing this [matter] in the Wisconsin Jefferson County Court died with her, and this has no bearing, the Court has ruled."(Document 42(2), Page 8 Lines 8-22.)

Her death could have no effect on the jurisdiction of the circuit court over the trust assets in Illinois under the decision of the United States Court of Appeals in this case.

There was no violation of the rules. In any event, the findings in regard to the purported violations were not put in issue by the Judgment of December 16th, 1985, and are void by reason of that fact.

In Rupert v Home Mut. Ins. Co., 138 Wis2d 1, at pages 9-10, and 405 NW2d at page 664, quoted at page 17 of this petition, the court said:

> "By setting pretrial conferences and trial dates, the court defines diligent prosecution of the action. After one year has passed, a plaintiff may reasonably assume that the

> court will set those dates within sixty days."

The trial court never set a trial date. Measured by that rule, petitioners were never guilty of want of prosecution because the court never defined the term.

Petitioners, in moving to vacate the Judgment of December 16th, 1985, moved the court to set the case down for trial at an early date convenient to the court on or subsequent to February 1st, 1986. (Doc. 23). The motion should have been allowed.

CONCLUSION

Our conclusion is that the petitioners have been deprived of their procedural rights and property by the State of Wisconsin without due process of of law, and have been denied the protection and equal protection of the laws by the State of Wisconsin, in violation

of their federal rights under the Fourteenth Amendment § 1, creating a great opportunity in this Court to grant certiorari and establish a precedent bringing federal law up to date in regard to dismissal of suits for a purported want of prosecution with prejudice by recognizing that there are situations in which judges have no real discretion or standing to dismiss a suit in that manner, as where they have failed to perform their own duties to the the plaintiffs, or are biased or prejudiced against them or in favor of their opponents.

Respectfully sumitted,

HUGH M. MATCHETT

APPENDIX

COURT OF APPEALS DECISION DATED AND RELEASED AUG 04 1988 FILED AUG 4 1988 CLERK OF COURT OF APPEALS OF WISCONSIN No. 86-1690 STATE OF WISCONSIN IN COURT OF APPEALS DISTRICT IV

HELEN PAGE NORTON, individually and as trustee, for the use and benefit of Dale Page Norton and John Jay Norton, and DALE PAGE NORTON and JOHN JAY NORTON, on their own behalf,

Petitioners-Appellants,

v.

RUSTE DURNELL BRIDGES, deceased for whose estate, no administrator has been appointed formerly a disabled person under the law of Illinois, and successor trustee of the JOHN L. PAGE TRUST, who pending the appointment of an administrator, is being treated as in being for all purposes that are necessary for the protection of others, and, PATRICK T. MURPHY, individually, and as public guardian of the County of Cook, State of Illinois, as guardian of her estate,

Respondents.

APPEAL from an order of the circuit court for Jefferson county: JOHN B. DANFORTH, Judge.

Affirmed.

Before Dykman, J., Eich, J., and Sundby, J.

DYKMAN, J. Helen Norton appeals from an order dismissing her complaint against the estate of Ruste Bridges for lack of prosecution. The dispositive issue is whether the trial court abused its discretion by dismissing the action. Because we conclude it did not, we affirm.

FACTS

In 1944, John Page, Norton's father, established a trust. He appointed George Bridges trustee. During Page's lifetime, he was the trust beneficiary. Norton became the beneficiary after Page's death. The trust was recorded with the register of deeds in Jefferson County, Wisconsin. Bridges invested the trust corpus in his home in Illinois. When Bridges died in 1958, he willed his home to his wife, Rustee Bridges. No successor trustee was appointed. Norton filed no claim against George Bridges' estate. Ruste Bridges,

an Illinois resident, was declared incomptent in 1980. She died in 1984.

In 1981, Norton filed a petition in Jefferson county circuit court in which she sought to be appointed successor trustee of the trust. Norton also requested that Patrick T. Murphy, the public guardian of Cook County, Illinois, who controlled Ruste Bridges' assets, be ordered to turn over the trust assets to Norton. On Murphy's motion, a federal district court ordered the case removed to federal court, but the seventh circuit reversed and remanded, concluding that the Jefferson county circuit court had exclusive jurisdiction over the trust. Norton v. Bridges, 712 F.2d 1156, 1166 (7th Cir. 1983).

On January 31, 1984, the Jefferson county circuit court appointed a guardian ad litem for Ruste Bridges. The court held a telephone

telephone scheduling conference March 19, 1984. On April 2, 1984, Norton, without leave of the court, amended her October 28, 1981 petition, adding Bridges' guardian ad litem as a party. Norton also filed a motion for summary judgment without noticing that motion. The action lay dormant until December 16, 1985, when the court, on its own motion, issued an order for dismissal because the case had not been diligently prosecuted. The court gave Norton twenty days to show good cause why the order should not be entered.

Norton filed a motion to vacate the December 16, 1985 order alleging that "there has been no want of prosecution in that on or about April 1st, 1984, they filed a First Amendment to their pending motion for summary judgment, and that motion is still pending as far as Hugh M. Matchett (Norton's attorney) and his clients know." At the May 12, 1986

motion hearing the court found that Norton had not shown good cause why the case should not be dismissed for lack of prosecution. The court referred to the procedural defects in Norton's April 2, 1984 motions, but concluded that "legally [that] is not the reason [for dismissal]. The reason is that [the case] went from 1984 until late 1985 without anything happening." The court then ordered the case dismissed for lack of prosecution pursuant to sec. 605.03, Stats.[1]

STANDARD OF REVIEW

> A motion to dismiss for want of prosecution is addressed to the sound discretion of the trial court, and we will affirm the court's action unless "it is clearly shown that there was an abuse of discretion." One seeking to set aside such a dismissal must show a "clear and

---

[1] Section 805.03, Stats., permits a trial court to dismiss an action for a claimant's failure to prosecute.

> justifiable excuse' for the delay." While this has been recognized as a "strict standard," it is said to be appropriate in light of the "'duty' of trial courts ... 'to refuse their aid to those who negligently or abusive fail to prosecute the actions which they commence.'" Finally, we note that because dismissal is a harsh sanction, the remedy is appropriate "only in cases of egregious conduct by a claimant."
>
> We will not reverse a discretionary determination by the trial court if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court's decision. The exercise of discretion is not the equivalent of unfettered decisionmaking, but to be sustained "must demonstrably be made and based upon the facts appearing in the record and in reliance on the appropriate and applicable law." Generally, however, we will look for reasons to sustain a discretionary determination.

Prahl v. Brosamle, 142 Wis.2d 658, 666-67, 420 N.W.2d 372, 376 (Ct. App. 1987) (citations omitted).

Norton alleges that it was the trial court's duty to set the case for trial. How-

ever, in Wisconsin, "[t]he obligation to bring his case to trial within a reasonable time lies with the plaintiff." Cukrowski v. Mt. Sinai Hospital, 67 Wis.2d 487, 500, 227 N.W.2d 95, 102, cert. denied, 423 U.S. 914 (1975).[2] Norton relies on Neylan v. Vorwald, 124 Wis.2d 85, 368 N.W.2d 648 (1985), for the proposition that a trial court may not dismiss a case for lack of prosecution without first giving notice. However, Norton was given twenty days' notice to show good cause for not dismissing her case before the order became final.

---

[2] Cukrowski must be read in conjunction with the following: "In probably the most significant change from current practice, the new rules -- most especially section 802.10. -- place the responsibility for moving the case on the court, as well as on the attorneys." Clausen and Lowe, The New Wisconsin Rules of Civil Procedure: Chapters 801-803, 59 Marq. L. Rev. 1, 68 (1976). The plaintiff now shares the burden of bring a case to trial.

Norton also claims that the mandate from Norton v. Bridges, 712 F.2d 1156 (7th Cir 1983), required the Jefferson county circuit court to appoint a successor trustee. Whatever legal effect such mandate may have had, we conclude that it could not protect Norton from dismissal for her lack of prosecution. The fact that Norton did nothing to prosecute her case from April 2, 1984 to December 16, 1986 provides a basis for the court's discretionary decision. Therefore we sustain it.[3] Prahl. 142 Wis.2d at 667, 420 N.W.2d at 376.

By the Court. --Order affirmed.

Inclusion in the official reports is not recommended.

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[3] We do not determine whether the circuit court has a continuing duty under sec. 701.17(1), Stats., to appoint a successor trustee.

Office Of The Clerk
SEAL S U P R E M E C O U R T
STATE OF WISCONSIN

Madison, December 6, 1988

To: Hon. John B. Danforth
Circuit Court of Jefferson County
Jefferson County Courthouse
Jefferson, WI 53549

Albert H. Beaver
118 N. Lawton Pl,
Sturgeon Bay, WI 54235

Bradford W. Wilcox
Vance, Vance and Wilcox, S.C.
79 No. Main St.
Fort Atkinson, WI 53538

William F. Hue
Krek, Frederichs & Hue
323 S. Whitewater Ave., Box 399

Rebecca S. Kolleng
Office of Public Guardian
Richard J Daley Center
Chicago, IL 60602

The Court today announced an order in your case as follows:

==========

No. 86-1690 Norton v. Ruste Durnell Bridges (deceased)

A petition for review pursuant to sec. 808.10, Stats., having been filed on behalf

of petitioners-appellants-petitioners, Helen Page Norton, individually and as trustee, for the use and benefit of Dale Page Norton and John Jay Norton, on their own behalf, and considered by the court,

IT IS ORDERED that the petition is denied without costs.

Hugh M. Matchett
5834 S. Stony Island Ave.
Chicago, IL 60637

==========

MARILYN L. GRAVES

Clerk of the Supreme Court

SC-105

STATE OF WISCONSIN CIRCUIT COURT JEFFERSON COUNTY

HELEN PAGE NORTON

Plaintiff(s)

-vs-

RUSTEE DURNELL BRIDGES

Defendants(s)

ORDER OF DISMISSAL

Case No. 81 CV 482

WHEREAS, the above captioned matter was filed on September 28, 1981; and

WHEREAS, it appears from the file herein that:

* * *

[X] The above captioned matter has not been diligently prosecuted:

* * *

NOW, THEREFORE, ON THE COURT'S OWN MOTION:

IT IS HEREBY ORDERED that the above captioned matter be and the same is hereby dismissed, without costs to either party; said

order shall become effective twenty days after rendition thereof unless prior to the effective date any party through counsel or personally shows good cause why such order should not be entered. Pursuant to Section 805.03, Statutes, a dismissal for lack of prosecution is on the merits and with prejudice. * * *

IT IS FURTHER ORDERED that any issue as to what constitutes good cause shall be resolved upon formal hearing, and that parties wishing to be heard shall request a hearing in writing prior to the effective date oF THIS order.

Dated: 12/16/85

BY THE COURT:

s/John B. Danforth
Circuit Judge
John B. Danforth

PC: Richard C. Smith
Hugh M. Matchett
Rebecca S. Kolleng
Bradford W. Wilcox

[HEADING OMITTED]

PETITIONERS' MOTION TO VACATE THE ORDER OF DECEMBER 16TH, 1985, AND FOR LEAVE TO FILE A SECOND AMENDMENT TO THEIR PETITION, TO STAND AS AN AMENDMENT TO THEIR PENDING MOTION FOR SUMMARY JUDGMENT, AND IF THAT MOTION FOR SUMMARY JUDGMENT IS DENIED, FOR TRIAL AT AN EARLY DATE CONVENIENT TO THE COURT ON OR SUBSEQUENT TO FEBRUARY 1ST, 1986.

CLERK OF THE CIRCUIT COURT
Jefferson County, Wisconsin
F I L E D

JAN 2 1986

- - - - - - - - - o'clock - - - M.
KENNETH M. SCHOPEN, Clerk

Now come the Petitioners HELEN PAGE NORTON, individually and as Trustee for the use and benefit of Dale Page Norton and John Jay Norton, and DALE PAGE NORTON and JOHN JAY NORTON, on their own behalf, by their attorneys HUGH M. MATCHETT of Chicago, Illinois, a member of the Illinois bar, and RICHARD C. SMITH of Jefferson, Wisconsin, a member of the Wisconsin bar, and move the Court to va-

cate its Order of December 16th, 1985, dismissing this suit effective 20 days from that date for a purported want of diligent prosecution, on the ground that there has been no want of prosecution in that on or about April 1st, 1984, they filed a First Amendment to their pending motion for summary judgment,and that motion is still pending as far as HUGH M. MATCHETT and his clients know. They further move the Court for leave to file a Second Amendment to their Petition, to also stand as a amendment to their motion for summary judgment, a copy of which is attached to this motion and incorporated herein by reference as though fully set forth, to bring this litigation up to date, and, in the event that motion for summary judgment so amended is denied, they move the Court to set this case down for trial at an early date convenient to the Court on or subsequent to February 1st, 1986. HELEN PAGE NORTON is presently on a

trip to Spain. HUGH M. MATCHETT talked to her on the telephone yesterday, December 29th, 1985, and she advised him that she would return to the United States about the third week in January, 1986, and would be available for trial on and after that date. HUGH M. MATCHETT has also talked to his client JOHN JAY NORTON, a resident of Wisconsin, and he will be available for trial on and after Febuary 1st, 1986. Under the circumstances as they understand the situation, the Order of December 16th, 1985, is a deprivation of procedural right and remedy without due process of Wisconsin law, and a denial to them of the protection and equal protection of that law, in violation of their rights under the Constitution of the State of Wisconsin and their Federal rights under the 14th Amendment, Section 1, to the Constitution of the United States, and under 42 USC § 1983. A hearing is requested on this motion. [Signature omitted.]

[HEADING OMITTED]

PETITIONERS' MOTION TO VACATE THE ORDER DISMISSING THIS SUIT FOR A PURPORTED WANT OF PROSECUTION BECAUSE IT IS A VOID ORDER SINCE RUSTEE DURNELL BRIDGES WAS DEAD AT THE TIME THE ORDER WAS ENTERED AND THERE WAS A WANT OF NECESSARY PARTIES; FOR IMMEDIATE APPOINTMENT OF A SUCCESSOR TRUSTEE OF THE JOHN L. PAGE TRUST; FOR SUBSTITUTION OF PARTIES AND JOINDER OF ALL PERSONS NEEDED FOR JUST AND COMPLETE ADJUDICATION; FOR PERMISSIVE JOINDER OF OTHER PARTIES; FOR SUMMONS TO ISSUE FORTHWITH; FOR SUMMARY JUDGMENT IN THEIR FAVOR ON ALL ISSUES POSSIBLE; AND FOR TRIAL ON ALL OTHER ISSUES AT AN EARLY DATE.

CLERK OF THE CIRCUIT COURT
Jefferson County, Wisconsin
F I L E D

APR 28 1986

- - - - - - - - - - o'clock - - - - M.
KENNETH M. SCHOPEN, Clerk

Now come HELEN PAGE NORTON, etc, et al, Petitioners, by their attorneys, HUGH M. MATCHETT, a member of the bar of the Supreme Court of Illinois, and STEVEN LUCHSINGER, a member of the bar of the Supreme Court of Wisconsin, and move the Court to vacate the

Order dismissing this suit for a purported want of prosecution because it is a void order since RUSTEE DUENELL BRIDGES was dead at the time the order was entered and there was a want of necessary parties; for immediate appointment of a successor trustee of the JOHN L. PAGE TRUST; for substitution of parties and joinder of persons needed for just and complete adjudication; for permissive joinder of other parties; for summons to isisue forthwith; for summary judgment in their favor on all issues possible; and for trial on all other issues at an early date; and more specifically prays the the Court:

1. Appoint HELEN PAGE NORTON Successor Trustee of the JOHN L. PAGE TRUST.

2. Appoint BRADFORD W. WILCOX Administrator of the Estate of RUSTE DURNELL BRIDGES, Deceased, with orders to submit himself to the jurisdiction of this Court in this case, and for instructions to request the Circuit

Court of Cook County, Illinois, to appoint somebody Administrator of the Estate of RUSTEE DURNELL BRIDGES, Deceased, in the State Illinois, summons to issue against him forthwith.

3. Substitute BRADFORD W. WILCOX, Administrator of the Estate of RUSTEE DURNELL BRIDGES, Deceased, as parties respondent in her place and stead.

4. Order PATRICT T. MURPHY to identify his surety bonding company on his bond, and make PATRICT T. MURPHY, individually and as Public Guardian of the County of Cook, State of Illinois, and as Guardian of the Estate of RUSTEE DURNELL BRIDGES, an incompetent person, and said bonding company, additional parties respondent in the above entitled cause, summons to issue against them forthwith.

[NAMES AND ADDRESSES AND TELEPHONE NUMBERS OMITTED]

Respectfully submitted,

Hugh M. Matchett

STATE OF WISCONSIN JEFFERSON COUNTY
CIRCUIT COURT
BRANCH I

HELEN PAGE NORTON, et al,
Petitioners,
v.
RUSTEE DURNELL BRIDGES, et
Respondents.

FINDINGS OF FACT
CONCLUSIONS OF LAW
AND ORDER

No. 81-CV-482

A hearing was held before the undersigned, the Honorable John B. Danforth, in the Circuit Court, Branch I, Jefferson County, at the Jefferson County Courthouse, on May 12, 1986, at 9:00 a.m. The petitioners appeared by their counsel, Steven Luchsinger and Hugh M. Matchett. The respondent, Patrick I. Murphy, appeared in person and by William F. Hue and Rebecca S. Kolleng, his counsel. The guardian ad litem, Bradford W. Wilcox, was also in attendance.

Now, upon the record and file herein and the argument of counsel, the undersigned makes the following:

FINDINGS OF FACT

1. The petitioners have done nothing to further the prosecution of this case since the telephone scheduling conference on March 19, 1984.

2. The petitioners have failed to serve a Notice of Motion or properly file a Motion Summary Judgment on March 29, 1984, on any party, or obtain a hearing date thereon.

3. The petitioners amended their Petition more than six months, in fact, more than 29 months, after the filing of the Summons and Petition without leave of Court.

4. The petitioners amended their Petition to include Bradford W. Wilcox as a named respondent without leave of the Court and without serving an authenticated copy of the Summons and Petition upon Mr. Wilcox.

5. Petitioners improperly moved the Court for leave to file a Second Amendment to the Petition by failing to obtain a motion date

or file a Notice of Motion.

6. The petitioners filed a Summary Judgment Motion without meeting any of the statutory requirements set forth in s. 802.08(1), (2), and (3), Stats.

7. The petitioners did not present any reason or show good cause, pursuant to the Court order of December 16, 1985, within the 20-day time period set forth therein, or any time thereafter, including the hearing of May 12, 1986, addressing the issue of why this Court should not dismiss this case for want of prosecution.

8. The following allegations have been made regarding the trust:

A. The trust at issue was made in Wisconsin on September 8, 1944, with George Bridges as trustee.

B. The trust corpus was invested in George Bridges' home.

C. George Bridges' died on June 7, 1958, a resident of Illinois.

D. George Bridges' estate was probated in Cook County, Illinois, in 1958.

E. No successor trustee was appointed after the death of George Bridges.

E. George Bridges willed his home to Rustee Durnell Bridges.

9. No claim against the Estate of George Bridges was filed on behalf of Helen Page Norton.

10. Respondent, Rustee Durnell Bridges, died, an Illinois resident, in May 1984, after being declared incompetent by the Illinois Court on June 16,

11. No probate action has yet been opened, in the state of Illinois, the residence of Rustee Durnell Bridges, and the state containing her estate.

~~12. This Court has no jurisdiction over~~

~~the corpus of the trust which exists in the state of Illinois.~~

CONCLUSIONS OF LAW

1. Petitioners' failure to further the prosecution of this case since March 19, 1984, constitutes failure to prosecute and violates s. 805.03, Stats.

2. The petitioners failed to comply with the statutes governing procedure in civil action, thus violating s. 805.03, Stats., by:

(a) Failing to serve notice of motion with their Motion for Summary Judgment on March 29, 1984, on any party, in violation of s. 802.02(2)(a), Stats.

(b) Amending their petition without leave of the Court.

(c) Amending their Petition to include Bradford W. Wilcox, as a named respondent, without leave of the Court and without serving an authenticated copy of the Summons and Petition upon Mr. Wilcox in violation of s. 803.05(1), Stats.

(d) Filing a Second Amendment to the Petition without leave of Court and without proper Notice of Motion, in violation of s. 802.09(1), Stats.

(e) Filing a Summary Judgment Motion without meeting the requirements of s. 802.08 (1), (2) and (3), Stats.

3. The petitioners' failed to show cause or present any reason why this action should not be dismissed for want of prosecution, either within the 20-day time period set forth in the Court's Order of December 16, 1985, or anytime thereafter, including the hearing held May 12, 1986; and, therefore, petitioners have in their burden of proof on this issue.

WHEREFORE, the Court orders:

1. This case is dismissed as a result of the petitioners' failure to prosecute.

2. This case is dismissed for failure of petitioners to comply with the statutes governing procedures in civil actions in Wiscon-

sin.

3. This dismissal operates as an adjudication on the merits and is with prejudice.

4, All parties shall be responsible for their own costs and attorney's fees in adjudicating this matter.

BY THE COURT:

s/ JOHN B. DANFORTH
Honorable John B. Danforth
Circuit Court Judge, Branch I
6-20-86

712 F.2d 1156 (1983)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 82-1877

HELEN PAGE NORTON,

Plaintiff-Appellant,

v.

RUSTE DURNAL BRIDGES, a disabled person under the law of Illinois, as Successor Trustee of the John L. Page Trust, and PATRICK T. MURPHY, as Public Guardian of the County of Cook, State of Illinois, as Guardian of her Estate,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin on Removal from
the Circuit Court of Jefferson County, Wisconsin.
No. 81 C 766—John C. Shabaz, *Judge.*

ARGUED APRIL 6, 1983—DECIDED JULY 15, 1983

Before PELL and ESCHBACH, *Circuit Judges,* and JAMESON, *Senior District Judge.**

PELL, *Circuit Judge.* Helen Page Norton, the plaintiff below, appeals from the district court's dismissal of that portion of her claim seeking a reduction of trust assets to her possession and an accounting and termination of

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* William J. Jameson, Senior District Judge of the District of Montana, sitting by designation.

the trust. The issue on appeal is whether a Wisconsin court can assert jurisdiction over the defendants in this action and, if it can, whether that jurisdiction precludes removal to the federal district court.

I. FACTS

In 1944, John L. Page, the plaintiff's father, established a revocable inter vivos trust for his own benefit until his death, and thereafter for the benefit of his daughter, Helen Page Norton (Page trust). George H. Bridges was named trustee. The trust was recorded with the register of deeds in Jefferson County, Wisconsin. Bridges was an Illinois resident and the trust res was transferred by him or to him in Illinois.[1]

The trust provided that the trustee should manage the trust as he saw fit and pay to the beneficiary the income of the trust and so much of the principal as he saw fit. The trust document gave the trustee power to appoint in writing a successor trustee. The trust instrument also provided that, should the trustee fail to appoint a successor, "the judge of the county court of Jefferson County, Wisconsin, may at any time and upon a proper showing appoint a succeeding trustee if none shall have been nominated" and "said court may issue letters of trust in such matter and take such further proceedings thereon as may be requisite and proper at the time for carrying out this trust."

John Page died in the mid-1940's. George Bridges invested the trust res in a mortgage on his home in Oak Park, Illinois, with interest payable at 4%. He made payments of interest and principal to Helen Page Norton. When the trust res amounted to $10,000, Bridges agreed to Norton's request that the trust res be left

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[1] The district judge found that the res was transferred to Bridges, suggesting that Bridges did not receive the assets from Page while physically present in Wisconsin. The appellant disagrees. For purposes of this appeal, it is unnecessary to resolve this factual question.

intact. He continued making interest payments to her until 1956. In 1956, the beneficiary agreed to Bridges' request that the interest should be allowed to accumulate.

Bridges died in 1958. His will named his wife, Ruste Durnal Bridges, as executor and chief beneficiary. The will contained the following statement pertinent to this action:

> In making this bequest to my wife, I recognize that in the past I have received certain monies from or in behalf of HELEN PAGE NORTON, and I expect that my wife will repay to her for the use and benefit of her children any balance I still owe at the time of my death, together with interest at 4% per annum.

The mortgaged home in Oak Park, Illinois, was left to Ruste Bridges.

On June 16, 1980, Ruste Bridges was declared a disabled person by an Illinois state court. Defendant Patrick T. Murphy, public guardian of Cook County, Illinois, was named her guardian and the guardian of her estate. The Oak Park residence was part of Ruste Bridges' estate. Pursuant to an order of the Circuit Court of Cook County, and allegedly with notice to Helen Page Norton, Murphy sold the Oak Park property for $48,501.

Norton brought this action in the Circuit Court of Jefferson County, Wisconsin. She sought appointment as successor trustee, pursuant to the provision in the trust instrument empowering that court to make such appointment. She also sought a court order requiring the defendants to reduce the trust assets to her possession, and permission to administer and terminate the trust.

The defendants removed the case to the Western District of Wisconsin, pursuant to 28 U.S.C. § 1441(a), asserting that the amount in controversy was greater than $10,000 and that diversity of citizenship was present because Norton is a Missouri resident and the defendants are Illinois residents.

Norton moved the district court to remand the case to the Jefferson County Court. The defendants sought dismissal on a number of grounds or, in the alternative, transfer of the case to the Northern District of Illinois pursuant to 28 U.S.C. § 1404.

The district court dismissed the case insofar as it sought to compel reduction of the trust assets. The court reasoned that it lacked in rem jurisdiction over the assets which were located in Illinois and that personal jurisdiction over the defendants could not be asserted under either the Wisconsin long-arm statute or the constitutional requirements delineated in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). The district judge found that the plaintiff's remedy lay in the courts of Illinois, rejecting Norton's assertion that the Wisconsin circuit court has exclusive jurisdiction over the action.

The district judge did find, however, that the Jefferson County court appeared to have jurisdiction to appoint a successor trustee. That aspect of the case was remanded to the Circuit Court of Jefferson County.

II. MERITS

Norton challenges the district court's holding that a court sitting in Wisconsin cannot assert jurisdiction over that portion of her claim which seeks a reduction of trust assets and an accounting and termination of the trust. This court must determine whether such an exercise of jurisdiction would comport with the United States Constitution and Wisconsin statutory law. If a Wisconsin court could exercise jurisdiction, we must decide whether jurisdiction lies exclusively in the state court or whether removal to the district court was proper.[2] Before addressing first the constitutional and

[2] If the Wisconsin state court lacks jurisdiction over the controversy, the federal district court, sitting in diversity, similarly lacks power to resolve the controversy. *Lakeside Bridge*

(Footnote continued on following page)

then the statutory issue, we touch briefly on the preliminary question whether Ruste Bridges was named successor trustee pursuant to George Bridges' will.

A. Status of Bridges as Successor Trustee

Although the defendants have not specifically argued in their brief that Ruste Bridges lacks the status of successor trustee, they make numerous references to that characterization as being a dubious one. At oral argument, the defendants suggested that Bridges might be no more than a constructive trustee and argued that, if she were, the statute of limitations precludes any action against her at this time.

The language in George Bridges' will, pursuant to which Ruste Bridges is allegedly a successor trustee, lacks evidence of careful drafting that would make certain her appointment as successor trustee. So far as the record before this court indicates, however, that provision of Bridges' will is merely consistent with a rather informal approach to complying with the duties of trusteeship. Further, the trust instrument required only that such an appointment be in writing and, to that extent, the will fulfills the requirement. We conclude that, for purposes of resolving the jurisdictional issues urged on appeal, Ruste Bridges must be considered a duly appointed successor trustee.

B. Constitutional Requirements

In *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), the Supreme Court held that a state could assert personal jurisdiction over a non-resident defendant only

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[2] *continued*
& Steel Co. v. Mountain State Construction Co., 597 F.2d 596, 598 (7th Cir. 1979), *cert. denied*, 445 U.S. 907 (1980).

The defendants have not cross-appealed on the question whether jurisdiction to appoint a successor trustee lies in the Jefferson County, Wisconsin circuit court. We therefore do not discuss that aspect of the case further on appeal.

if that defendant had sufficient contacts with the forum state. The court below found that Bridges lacked the required minimum contacts with the state of Wisconsin, citing *Hanson v. Denckla*, 357 U.S. 235 (1958), in support of its conclusion.

In *Hanson*, an inter vivos trust was created by a Pennsylvania settlor. The settlor named a Delaware trust company as trustee. The trust res was placed with the trustee in Delaware. The settlor then moved to Florida. After her death in Florida, the settlor's will was admitted to probate there. An issue arose as to whether the settlor had exercised a testamentary power of appointment over the corpus of the trust. The Florida Supreme Court held that Florida could exercise jurisdiction over the non-resident trustee and the non-resident beneficiaries of the trust even though the trust assets were in Delaware.

After Delaware refused to accord the Florida judgment full faith and credit, the United States Supreme Court reviewed the case. The Supreme Court held that Florida lacked personal jurisdiction over the trustee, stating:

> We fail to find such [minimum] contacts in the circumstances of this case. The defendant trust company has no office in Florida, and transacts no business there. None of the trust assets has ever been held or administered in Florida, and the record discloses no solicitation of business in that State by either person or mail.

357 U.S. at 257. *Hanson v. Denckla* is, however, distinguishable from the present controversy. The trust at issue in that case was neither created in Florida nor registered in that state. There was no provision creating a power of appointment over successor trustees in a Florida court. Further, the trustee in *Hanson* was an institution rather than an individual, which suggests

that the settlor intended administration of the trust to occur in Delaware.[3]

Boone v. Wachovia Bank & Trust Co., 163 F.2d 809 (D.C. Cir. 1947), upon which Norton relies is similarly not dispositive. In *Boone*, the appellant urged that a North Carolina judgment removing him as testamentary trustee was not entitled to full faith and credit. The trust had been established under the decedent's will which had been admitted to probate in North Carolina. That court had appointed Boone trustee. The North Carolina court was exercising continuing jurisdiction over the trust. Upon application of the beneficiaries, the North Carolina court removed Boone as trustee.

Prior to the suit for removal, Boone had moved to the District of Columbia. He had taken the trust assets with him. Boone was not personally served in the removal proceeding and he did not appear in North Carolina to contest the removal action. On appeal before the District of Columbia court of appeals, Boone urged that the North Carolina judgment was invalid because that court lacked both power over the trust res and personal jurisdiction over him.

The District of Columbia court held the North Carolina judgment enforceable because the North Carolina court already had jurisdiction of the trust and the assets were subject to it. The court held that constructive service was sufficient because the proceeding was characterizable as quasi in rem rather than in personam.

Norton argues that the relief she seeks against Bridges requires only quasi in rem jurisdiction rather than personal jurisdiction and therefore, under *Boone*, the Wisconsin court can exercise jurisdiction over this controversy. In considering the constitutional requirements for jurisdiction, the distinction between personal and quasi in rem jurisdiction is of little help. In *Shaffer v. Heitner*,

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[3] As discussed *infra*, the state in which an institutional trustee is domiciled is generally held to be the state in which the trust is administered.

433 U.S. 186 (1977), the Supreme Court held that the minimum contacts standard enunciated in *International Shoe* must be satisfied for a judgment quasi in rem to meet the requirements of due process. For constitutional analysis, the relevance of *Boone* lies not in how the jurisdictional basis is labeled but in whether minimum contacts between the forum and the defendant were demonstrated and, if they were, whether *Boone* supports a finding that minimum contacts exist in the present case.

There can be little question that trustee Boone had the requisite contacts with North Carolina to permit an exercise of jurisdiction. The trust had been created pursuant to the decedent's will which had been admitted to probate in North Carolina. Boone had been appointed trustee by the court.

Bridges is correct in her assertion that these facts, and the continuing jurisdiction exercised by North Carolina over the trust at issue in *Boone*, distinguish that case from the present controversy. In this case, the trust was not created pursuant to will. The settlor, rather than a Wisconsin court, appointed the original trustee who in turn appointed Ruste Bridges. The courts of Wisconsin do not have continuing jurisdiction over the trust because they have not yet taken any action regarding it.

Nonetheless, *Boone* illustrates a principle pertinent to resolution of this jurisdictional controversy. Numerous courts have held that, "[i]n the case of an inter vivos trust where the administration of the trust is fixed in a particular state, the courts of that state will exercise jurisdiction." *Restatement (Second) of Conflict of Laws* § 267 reporter's note (rev. ed. 1971). Further, it is recognized that if a trust is to be administered in a particular state, that state has jurisdiction to determine not only the interests of the beneficiaries in the trust properties but also questions relating to the liability of the trustee to the beneficiaries. *Id.* § 267 comment d; *see* G. Bogert, *The Law of Trusts and Trustees* § 292, at 409 (2d ed. rev. 1977). These authorities suggest that the critical difference between *Hanson* and *Boone* is neither the

actual physical location of the trust assets nor whether the trust is inter vivos or testamentary but rather that the *Hanson* trust was not administered in the state claiming jurisdiction whereas the *Boone* trust was.

Absent an express statement in the trust instrument that the trust is to be administered in a designated state, courts will attempt to infer from the instrument the settlor's intent as to place of administration. *Restatement, supra*, § 267 comment c; *cf. id* § 272 comment c (choice of law to be applied in trust administration may be evident, despite absence of express designation, from the language of the trust instrument or other circumstances). One approach is to determine the forum most closely connected with the administration of the trust. A. Scott, *The Law of Trusts* § 568, at 3810-11 (3d ed. 1967). For instance, in *Cocke v. Duke University*, 260 N.C. 1, 131 S.E.2d 909 (1963), the issue was whether North Carolina could assert jurisdiction over the Duke Endowment pursuant to which Duke University and several other North Carolina institutions were benefitted. The trust had been created in New Jersey, subject to New Jersey law. A majority, but not all of the trustees were North Carolina residents. North Carolina did not have personal jurisdiction over all the possible beneficiaries. Nonetheless, the assertion of jurisdiction by a North Carolina court was upheld because it was the state most closely connected with the administration of the trust.

When trust assets are held by an institutional trustee, the state in which that institution is located is generally considered the place of administration of the trust. *See* A. Scott, *supra*, § 571, at 3823; *Hanson v. Denckla*, 357 U.S. 235 (1958). This principle is readily explained by the fact that an institution is relatively likely to remain domiciled in the same forum over the entire period of the trust's existence. By choosing such an institution as trustee, the settlor has impliedly chosen a state of administration.

When the named trustee is an individual, however, it is less certain that his or her domicile at any particular time reflects the intent of the settlor to fix that forum as

the place of administration. This follows from the greater likelihood that an individual trustee will change his or her domicile over the period of the trust's existence. If the trustee's domicile determined the place of administration, and if the trustee were a peripatetic one, the place of administration—and therefore the law applicable to the trust as well as the forum empowered to assert jurisdiction over trust questions—would change frequently. It is unlikely that a settlor would choose to make a trust, which by its nature represents a long-term plan of the settlor's, subject to such uncertainty.

In this case, however, George Bridges was not only an Illinois domiciliary at the time Page appointed him trustee but he remained an Illinois resident until his death. His wife, similarly, has been an Illinois domiciliary throughout the existence of the Page trust. The question is whether anything in the trust instrument indicates that the settlor intended Wisconsin—rather than Illinois—to be the place of administration of the trust.

The fact that the trust was created in Wisconsin by a Wisconsin settlor is not, by itself, dispositive. *See Cocke v. Duke University*, 260 N.C. 1, 131 S.E.2d 909 (1963). The registration of the trust in Wisconsin is more significant. Although we are aware of no Wisconsin statute addressing the significance of registering an inter vivos trust in that state, the act of registration is some evidence of the settlor's intent that Wisconsin should play a significant role in the administration of the trust.

The importance of the Wisconsin registration of the Page trust, for purposes of assessing whether an assertion of jurisdiction by Wisconsin would be constitutional, is illustrated by the provisions of the Uniform Probate Code.[4] The Code is framed so as to permit an

[4] Because Wisconsin has not enacted the Uniform Probate Code, the Code is relevant only to the constitutional, rather than the statutory, jurisdictional question raised by this appeal.

exercise of jurisdiction to the full extent permitted by the Constitution. § 1-302. It applies to inter vivos as well as testamentary trusts. § 1-301 and Art. VII, pt. I, general comment. A trust must be registered at the principal place of administration, § 7-101, and a trustee who either registers a trust or accepts the trusteeship of a registered trust submits personally to the jurisdiction of the court of the registration state, § 7-103. Importantly, the draftsmen of the Code state: "Clearly the trustee can be deemed to consent to jurisdiction by virtue of registration." § 7-103.

Bridges' acceptance of the trusteeship of a trust that the settlor had registered in Wisconsin could be deemed, consistent with the Uniform Probate Code, an acknowledgment that the trust was to be administered in Wisconsin and consent to the jurisdiction of the Wisconsin court. Because the constraints of due process are recognized by the Code, this analogy suggests that an assertion of jurisdiction by the Wisconsin court over the Page trust would be constitutional.

Finally, it is significant that the Page trust explicitly accorded the Jefferson County, Wisconsin circuit court power of appointment over successor trustees and authorized that court to take further action regarding the trust. In discussing this aspect of Norton's claim, the judge below characterized the appointment of a successor trustee as an action requiring in rem jurisdiction. The district court also found it significant that the settlor *expressly* named the Wisconsin court as having power to act in this capacity. In rem jurisdiction cannot be premised on the presence of trust assets in the state, however, because the assets are in Illinois. The only basis of in rem jurisdiction, therefore, is the role played by Wisconsin in the administration of the trust. The district judge apparently reasoned that it was the express intent of the settlor that Wisconsin be the state of administration for purposes of exercising a power of appointment and that the settlor's intent was controlling. There is little basis, however, for declaring Wisconsin the place of administration for purposes of only this one function. As stated above, when a trust instru-

ment is not explicit as to the intended place of administration, one must scrutinize the trust instrument and consider the impact of the trust in order to ascertain the settlor's intent. *See Restatement, supra*, § 267 comment c; A. Scott, *supra*, § 568, at 3810-11; *Cocke v. Duke University*, 260 N.C. 1, 131 S.E.2d 909 (1963). Consistent with these authorities, Page's empowering the Wisconsin court to appoint a successor trustee and to take required actions thereafter regarding the trust is an indication of his intent that the trust should be administered in Wisconsin.

The result is no different if we characterize the inquiry as whether Wisconsin is the state most closely connected with the administration of the trust. Bridges being a resident of Illinois, investing the trust assets in a home mortgage in that state and, from time to time, making payments of principal and/or interest to a beneficiary domiciled in a state other than Illinois, are not sufficient to connect the trust more closely with Illinois than with Wisconsin in light of the trust's having been created in Wisconsin by a Wisconsin settlor, registered in Wisconsin, and subject to the power to appoint successor trustees that was accorded the Wisconsin court.

In summary, the registration of the trust in Wisconsin and the power of appointment accorded the Wisconsin court evidence Page's intent that the trust should be administered in that state. George Bridges and Ruste Bridges accepted the trusteeship with knowledge of these considerations and therefore can be deemed to have consented to the jurisdiction of the Wisconsin court insofar as that court might act to determine any rights or liabilities relating to the trust. *See* Uniform Probate Code § 7-103 and comment; G. Bogert, *supra*, § 292, at 412. These facts satisfy the "minimum contacts" standard of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and therefore an exercise of jurisdiction by the Wisconsin court over Norton's claim is consistent with due process.

C. Wisconsin Statutory Jurisdiction

The seminal Wisconsin case dealing with an assertion of jurisdiction over nonresidents of Wisconsin in a trust action is *Laughlin v. Wells Building Co.*, 169 Wis. 50, 171 N.W. 755 (1919). The defendants argue that *Laughlin* precludes a Wisconsin court from exercising jurisdiction over that portion of Norton's claim which is at issue on this appeal.

Laughlin, a Wisconsin resident, filed suit in Wisconsin seeking a declaration that he was the sole trustee and enjoining other named defendants from interfering in the trust. He also sought a determination of all parties' rights in the trust. The trust assets were located in the vault of the Wells Building Company (Wells) in Milwaukee. All of the defendants, other than Wells, were Missouri residents and had been served summons in the proceeding pursuant only to an order of publication. The circuit court found the service to be insufficient.

The Wisconsin Supreme Court reversed and remanded the case, stating:

> No reason is perceived why a court having jurisdiction over the property is not an appropriate forum in which to maintain the action. Although respondents are all residents of Missouri, it may well happen that parties similarly situated be residents of different states, in which case jurisdiction by any court, except one having jurisdiction of the property, would be difficult, if not impossible, of attainment.

171 N.W. at 757. Finding that the state long-arm statute authorized service by publication against the respondents, the court remanded the case for a determination as to Laughlin's duties under the trust agreement.

Laughlin illustrates the principle that if a forum court has jurisdiction over the trust assets, its in rem decree may determine or affect all interests in those assets. G. Bogert, *supra*, § 292, at 406 and n.19. Contrary to the suggestion of the appellees, *Laughlin* does not hold that the *only* court having jurisdiction over a

trust dispute that involves residents of different states is the forum in which the trust assets are located.

As discussed in Section II(B), *supra*, this case involves a trust that was, according to the intent of the settlor, to be administered in Wisconsin despite the assets being physically present in Illinois. Because the trust at issue in *Laughlin* was administered in Wisconsin, one could argue that *Laughlin* supports, rather than prohibits, an assertion of jurisdiction in the present case. We are not convinced, however, that *Laughlin* should be read so broadly. We conclude that it simply does not address the situation presented by this case. Because we are aware of no other Wisconsin decision relevant to this controversy, we turn to an interpretation of the pertinent Wisconsin statutes.

Norton cites both the Wisconsin provisions that authorize in personam and in rem or quasi in rem jurisdiction. Whether the appropriate jurisdictional basis in this case is in personam or quasi in rem is not resolved by Section II(B), *supra*. It was unnecessary to resolve the question in determining the constitutionality of Wisconsin's exercising jurisdiction because demonstrated contacts between the forum and the defendant were required in either case. *Shaffer v. Heitner*, 433 U.S. 186 (1977). Further, the Uniform Probate Code, upon which we relied in addressing the constitutional question fails to make the distinction between personal and quasi in rem jurisdiction. § 7-103 comment.[5]

The Wisconsin provision governing in rem or quasi in rem jurisdiction provides, in relevant part, as follows:

> A court of this state having jurisdiction of the subject matter may exercise jurisdiction in rem or

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[5] The Uniform Probate Code relies primarily upon consent jurisdiction when the defendant is a foreign trustee. § 7-103 comment. As stated above, Wisconsin has not enacted the Uniform Probate Code and we find no jurisdictional statute analogous to the consent jurisdiction upon which the Code relies.

> quasi in rem on the grounds stated in this section. A judgment in rem or quasi in rem may affect the interests of a defendant in the status, property or things acted upon only if a summons has been served upon the defendant pursuant to 801.12.
>
> (1) When the subject of the action is real or personal property in this state and the defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partially in excluding the defendant from any interest or lien therein.

Wis. Stat. § 801.07. This statutory section would support Wisconsin jurisdiction in the present case if the trust itself is characterized as "property" and the assets, which are physically in Illinois, are deemed to be subject to the jurisdiction of the court because the assets are subject to the trust. This line of reasoning is consistent with *Boone v. Wachovia Bank & Trust Co.*, 163 F.2d 809 (D.C. Cir. 1947), and appears most consistent with the principle that in rem jurisdiction over a trust permits a determination of the rights and liabilities of all interested parties. *Restatement*, *supra*, § 267 comment d; G. Bogert, *supra*, § 292, at 409-10. Further, characterizing the jurisdictional basis of this action as in rem or quasi in rem is most consistent with the analysis in Section II(B), *supra*, in which we rely primarily on the relationship of the Page trust to the state of Wisconsin that is established by the settlor's intent that the trust be administered in that state.

Alternatively, Wisconsin permits as assertion of personal jurisdiction in any action which arises out of:

> c. A claim that the defendant return, restore, or account to the plaintiff for any asset or thing of value which was within this state at the time the defendant acquired possession or control over it.

Wis. Stat. § 801.05(6)(c). Because the settlor was a Wisconsin resident, the trustee's control over the assets necessarily originated when the assets were still in Wisconsin, at the time the trust was created. The applica-

bility of this statutory section is unaffected by whether Page forwarded the assets to Bridges in Illinois or whether Bridges came to Wisconsin to take possession of them, a factual issue that is unclear from the record.[6]

Our conclusion that either or both of these statutory provisions support Wisconsin jurisdiction over the entirety of Norton's claim is supported by Wisconsin law in that the Wisconsin Supreme Court has stated that "at the time the pertinent provisions of the long-arm statute were adopted it was intended 'to provide for the exercise of jurisdiction over non-resident defendants to the full extent consistent with the requisites of due process of law.'" *Zerbel v. H.L. Federman & Co.*, 48 Wis. 2d 54, 70, 179 N.W.2d 872, 881 (1970) (quoting *Flambeau Plastics Corp. v. King Bee Manufacturing Co.*, 24 Wis. 2d 459, 464, 129 N.W.2d 237, 240 (1964)).

D. Exclusivity of Jurisdiction in Jefferson County Court

Having concluded that a court sitting in Wisconsin can exercise jurisdiction over Norton's entire claim, we must determine whether the circuit court of Jefferson County, Wisconsin has exclusive jurisdiction over the controversy, thereby making removal to the Wisconsin federal district court improper. Because of his holding

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[6] The defendants imply in their brief that even if personal jurisdiction could be exercised by a Wisconsin court over Ruste Bridges, no personal jurisdiction over Patrick T. Murphy exists. Section 801.05(12) of the Wisconsin Statutes permits an assertion of personal jurisdiction over the personal representative of a deceased person who, if he were living, would be subject to jurisdiction pursuant to Wis. Stat. §§ 801.05(2)-(11). Although Ruste Bridges is living, her status as an incompetent under Illinois law, would suggest that section 801.05(12) governs whether jurisdiction can be asserted over the guardian of her estate. Because the basis of personal jurisdiction that would apply to Bridges is codified as Wis. Stat. § 801.05(6)(c), jurisdiction over Murphy is consistent with section 801.05(12).

that no court in Wisconsin could decide the controversy, the district judge did not reach this question.[7]

The Supreme Court disposition in *Princess Lida v. Thompson*, 305 U.S. 456 (1939), supports Norton's contention that jurisdiction lies exclusively in the state court. In *Princess Lida*, the Supreme Court considered whether a Pennsylvania federal district court could entertain a suit brought by the beneficiaries of an inter vivos trust alleging mismanagement of the trust funds and praying that the trustees be removed and made to account for the losses suffered by the trust. The United States Supreme Court upheld the decision of the Pennsylvania Supreme Court enjoining the petitioners from proceeding further in the federal court. The United States Supreme Court distinguished cases like *Princess Lida*, in which the claims related to administration and restoration of corpus, from cases in which a plaintiff seeks merely an adjudication regarding the validity or amount of his claims in a fund. *Id.* at 466-67. The principle illustrated by *Princess Lida* is that "the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other." *Id.* at 466.

In *West v. First Fond du Lac National Bank*, 31 F. Supp. 169 (E.D. Wis. 1940), the Wisconsin district court relied on *Princess Lida* in dismissing a federal action that sought an accounting and reduction of trust assets and an appointment of new trustees. The district court held that, under Wisconsin law, exclusive jurisdiction vested in the county court.

West involved a testamentary rather than an inter vivos trust. That distinction does not render the case inapposite, however, because the trust at issue in *Princess Lida*, upon which the *West* court relied, was created

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[7] It is conceded that the requirements of diversity jurisdiction are met in that the amount in controversy exceeds $10,000 and the parties are citizens of different states, *see* 28 U.S.C. § 1332.

inter vivos. Further, the *West* district court relied on the fact that the will pursuant to which that testamentary trust arose was in probate in the Wisconsin court as a *separate* and *additional* ground for dismissing the federal action. 31 F. Supp. at 171.

The relief sought by Norton pertains to the actual administration of the Page trust and is very similar to that sought in *West*. The basis of Wisconsin jurisdiction in this case is fundamentally a power over "property," the trust itself to which the assets are subject.[8] *Princess Lida* and *West* support the conclusion that, if the Wisconsin state court first assumes jurisdiction over the trust, that jurisdiction is exclusive.

In *Princess Lida*, jurisdiction had been assumed by the state court by virtue of the trustees having filed accountings with the common plea court. In *West*, the admission of the decedent's will, pursuant to which the trust arose, to probate constituted the prior assertion of jurisdiction. The defendants argue that this case is distinguishable because there has been no previous assumption of jurisdiction by the Wisconsin court over the Page trust.

At issue in *Princess Lida* was whether the power of appointment accorded the common plea court would fulfill the requirement of a previous assumption of jurisdiction. The state court had been named in the trust instrument as having the power to appoint a successor trustee should the remaining trustees be unable to agree on a choice. There was no indication that such an impasse among the trustees had occurred. Nonetheless, the appointment of new trustees had routinely been reported to the common plea court which had purported

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[8] Our having considered the applicability of Wis. Stat. § 801.05(6)(c) (in personam jurisdiction) to this action does not alter our conclusion that Wisconsin has power to adjudicate the controversy primarily because of that state's relationship, as a reflection of the settlor's express and implied intent, to the administration of the trust.

to confirm and ratify the action taken by the trustees. 305 U.S. at 462. The petitioners urged that this action by the state court was wholly gratuitous and therefore did not constitute an assumption of jurisdiction. The Supreme Court stated that it was "unnecessary to pass upon the contention." of the petitioners. *Id.*

In the present case, the Jefferson County, Wisconsin court is not only accorded a power of appointment but will forthwith be required to exercise it. Nothing in *Princess Lida* remotely suggests that such *required* exercise of a power of appointment fails to constitute an assumption of jurisdiction. The pertinent Wisconsin statutes, in fact, imply that the power to appoint a successor trustee exists only if the court *does* have jurisdiction over the trust. *See* Wis. Stat. § 707.17(1) (appointment of successor trustee by "court") and § 701.01(8) ("court" defined as "court having jurisdiction"). The exercise of the power to appoint a successor trustee of the Page trust will constitute the first assumption of jurisdiction in this case and will entitle the Wisconsin state court to adjudicate the entire controversy, thereby excluding the federal district court from any role in the controversy.

CONCLUSION

The Jefferson County, Wisconsin circuit court may assert exclusive jurisdiction over the entire claim urged by Norton. The varying relief Norton seeks suggests that the court having power over the trust, to which the assets are subject, is the appropriate forum in which to litigate this dispute. Such an assertion of jurisdiction is consistent with the requirements of both due process and Wisconsin statutory law. Further, the consolidation of all proceedings regarding the trust in one court is consistent with the policy favoring resolution of all trust-related questions in one forum. The order of the district court dismissing Norton's claim seeking a reduction of trust assets, an accounting, and termination of the trust is reversed. The case is remanded to the dis-

trict court with instructions to remand the entire matter to the circuit court of Jefferson County, Wisconsin.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit